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CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 235.

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*
RESORT AIRLINES, INC., *Intervener.*

On Petition for Rehearing of Order Denying Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ANSWER OF INTERVENER IN OPPOSITION.

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October 31, 1950.

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JURISDICTION.

The Petition for Writ of Certiorari filed by the Petitioner on August 4, 1950 was denied by this Court on October 9, 1950. Petitioner on October 23, 1950 filed a Petition for Rehearing. This response is filed within ten days of the service of the Petition for Rehearing in accordance with Rule 33 of this Court.

ARGUMENT.

Petitioner has interpreted the decision of the United States Court of Appeals for the Second Circuit in *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, et al.*, 184 F. 2d 66 (C.C.A. 2nd, decided August 14, 1950) as conflicting with the *per curiam* order of the court below dismissing the Petition for Review, and now urges this alleged conflict as new grounds upon which this Court should grant the Petition for Writ of Certiorari.[1]

Intervenor submits that there is no such conflict. The court below and the court in the *TWA Case* both dismissed for lack of jurisdiction petitions for review of orders of the Civil Aeronautics Board approved by the President on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948).

Petitioner gears its alleged conflict, however, to the fact that in the *TWA Case* the court wrote an opinion in which it "considered the contentions made by the Petitioners with respect to invalid exercise of Board and Presidential power . . . " (Petition for Rehearing, p. 2). This portion of the *TWA Case* opinion dealt, as will be shown below, with the question of whether or not there was before the court an order of the Board which was subject to Presidential approval *at all*. In the case before this Court, however, Petitioner has alleged error *only* within the ambit of an order of the Board *admittedly* subject to the approval of the President. There can be no conflict, therefore, based on the discussion of issues in the *TWA Case* which are not even raised in this case.

The *TWA Case* in the Second Circuit arose on motions for a stay pending judicial review of an order of the Civil Aeronautics Board, which had been approved by the President and which reflected a directive by him contrary to a

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[1] Intervenor cited the *TWA Case* in its Brief in Opposition to the Petition for a Writ of Certiorari (p. 6). Petitioner did not refer at all to this case in its Reply brief to the Briefs in Opposition.

recommended order of the Board. The Second Circuit held that interlocutory relief should be denied and dismissed the Petitions for Review on the grounds that it lacked jurisdiction because of the decision of this Court in the *Waterman Case,* 184 F. 2d 66, 70. In rejecting contentions in the Petitions for Review in the *TWA Case* that the initial order of the Board denying applications for approval of the transfer of a certificate and for the acquisition of assets was not subject to Presidential approval because it did not involve matters specifically falling within any of the categories set out in Section 801 of the Civil Aeronautics Act, the Court discussed the question of whether the challenged order was or was not so subject to approval by the President. Having held that it was, the court next discussed the contention that even if the initial order was subject to the approval of the President, it became finalized when signed by the President and returned to the Board with the result that the President was powerless to retract his approval and direct the Board to submit a different decision and order. The court dismissed this contention as incorrect which left before it a final order of the Board subject to the approval of, and approved by, the President to which the *Waterman Case* doctrine applied.

Thus, the court in the *TWA Case, prior* to its determination of the applicability of the *Waterman Case* doctrine considered and rejected the contention that the order in question should not have been subject to the approval of the President *at all.* Thereupon it dismissed the Petitions for Review for lack of jurisdiction in accordance with the *Waterman Case.*

In this proceeding, the court below had no cause to discuss any matter of the kind considered by the court in the *TWA Case* because here it was never contended that the order of the Board was not subject to the approval of the President. Petitioner herein merely contended that there were certain claimed defects in the Presidentially reviewable order.

Petitioner, therefore, is completely incorrect in assuming that the discussion of the Second Circuit of the question of whether an order was before it which was subject to Presidential approval conflicted with the *per curiam* order of the court below where that question never arose at all. Petitioner can only labor at establishing an alleged conflict through a series of five assumptions injected into the *Waterman Case*, the decision of the court in the *TWA Case*, and the *pro curiam* decision of the court below. Error in any one of the five assumptions destroys Petitioner's position.

(1) Petitioner has first assumed that the introductory phrase of the *Waterman Case* opinion (i.e., "By proceedings not challenged as to regularity") creates an exception to the immunity from judicial review otherwise extended by the *Waterman Case* to orders of the Board approved by the President. The dissenting opinion in the *Waterman Case* is directly contrary to this interpretation by Petitioner of the majority's language. 333 U. S. 103, 117, 118.

(2 & 3) Petitioner next assumes that the Second Circuit in the *TWA Case* "adopted" the view which Petitioner has assumed as given to this introductory phrase in the *Waterman Case* opinion, and, further, assumes that the Second Circuit considered the contentions raised in the *TWA Case* as falling within the category of such "challenges" as delineated by Petitioner. Surely, such an important interpretation of the *Waterman Case* by the Second Circuit in the *TWA Case* would have been clearly stated or at least mentioned in the opinion, if that is what was meant, yet nowhere in the extensive citation from the *Waterman Case* and the discussion thereof to be found in the opinion is there any statement to that effect.

(4) Petitioner next assumes that the nature of the contentions raised in the *TWA Case* and in this case were similar "challenges" as delineated by Petitioner. Intervenor has pointed out above that these contentions are

completely different and that the type of contentions raised in the *TWA Case* were never raised or considered in this case.

(5) Finally, to complete the alleged conflict, Petitioner assumes that the citation of the *Waterman Case* by the court below in its *per curiam* order dismissing the Petition for Review was a holding that the *Waterman Case* had been construed to exclude judicial review of *any* order of the Board approved by the President. Certainly the proper interpretation of this *per curiam* order is that the *specific* contentions which Petitioner raised below were within the scope of the immunity from judicial review extended to orders of the Board approved by the President by the *Waterman Case.*

CONCLUSION.

Intervenor submits that Petitioner's alleged conflict between the *TWA Case* and the *per curiam* order of the court below is only made possible by casuistic reasoning and a series of assumptions. An unclouded analysis of the two cases shows no conflict in their holdings, which were completely in accord in dismissing petitions for review of orders of the Board subject to Presidential approval on the authority of the *Waterman Case.* Nor is a conflict to be found in the consideration by the Second Circuit of the question of whether the order complained of was subject to Presidential review at all, since this fact was never challenged in the court below.

WHEREFORE, Intervenor, Resort Airlines, Inc., prays that this Honorable Court deny the Petition for Rehearing of the Order Denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the Petitioner, Chicago & Southern Air Lines, Inc.

Respectfully submitted,

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Dated: October 31, 1950.